INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(THE GAMBIA *v.* MYANMAR)

WRITTEN OBSERVATIONS OF THE KINGDOM OF BELGIUM ON THE SUBJECT-MATTER OF ITS INTERVENTION UNDER ARTICLE 63 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

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1. On 12 December 2024, the Kingdom of Belgium (hereinafter "Belgium") filed a Declaration of intervention (hereinafter the "Declaration of intervention") before the International Court of Justice (hereinafter the "Court"), in accordance with Article 63, paragraph 2, of the Statute of the Court (hereinafter the "Statute"), in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar*)[1].

2. In its Declaration, Belgium expressed its wish to provide the Court with its views on the construction of Article II of the convention at issue, the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Convention"), including in particular the question of the scope of the specific intent required under that provision[2].

3. In its Order of 25 July 2025[3], the Court found that Belgium's Declaration of intervention was admissible. It fixed 25 September 2025 as the time-limit for the filing of the written observations referred to in Article 86, paragraph 1, of the Rules of Court[4] (hereinafter the "Rules").

4. Belgium now wishes to provide its written observations on the subject-matter of its intervention. It will begin by setting out the means used to interpret the Convention (I), before addressing the content of this interpretation (II).

I. MEANS OF INTERPRETATION

5. According to the well-established jurisprudence of the Court, "Article II of the Convention, including the phrase 'committed with intent to destroy', must be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose', as prescribed by customary law as reflected in Article 31 of the Vienna Convention on the Law of Treaties"[5]. The Court has also specified that in order to "confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion"[6], in accordance with Article 32 of the Vienna Convention on the Law of Treaties, whose customary character has been recalled by the Court[7].

6. Belgium further notes that particular attention should be given to the jurisprudence of criminal courts and tribunals — both national and international — regarding the interpretation of the concept of genocidal intent.

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Declaration of intervention of the Kingdom of Belgium, Intervention under Article 63 of the Statute of the International Court of Justice, 11 Dec. 2024.

[2] *Ibid*., para. 16.

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar: 7 States intervening), Admissibility of the Declarations of Intervention, Order of 25 July 2025*, para. 64.

[4] *Ibid*.

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 64, para. 138.

[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 110, para. 160.

[7] *Ibid*.

7. Indeed, domestic criminal jurisprudence may usefully play a twofold role in the interpretation of the Convention. First, it may reflect subsequent practice by the States parties to the Convention within the meaning of Article 31, paragraph 3 *(b)*, of the Vienna Convention on the Law of Treaties, and thereby shed light on "the agreement of the parties regarding its interpretation". Second, where it does not establish such agreement, this jurisprudence, as State practice, may be used as a supplementary means of interpretation as provided for by Article 32 of the same Convention and as indicated by the International Law Commission[8].

8. Belgium notes in this regard that the concept of domestic jurisprudence includes decisions rendered by certain "mixed" chambers. Indeed, while they are composed of both national and international judges, such bodies are traditionally considered domestic judicial forums when they are established under domestic law and incorporated into the judicial system of the State concerned[9]. Examples include the Extraordinary Chambers in the Courts of Cambodia (hereinafter the "ECCC")[10] and the War Crimes Chamber of the Court of Bosnia and Herzegovina[11].

9. As for international criminal jurisprudence — in particular, the jurisprudence of courts or tribunals established by resolutions of the United Nations Security Council, such as the International Criminal Tribunal for the former Yugoslavia (hereinafter the "ICTY") or the International Criminal Tribunal for Rwanda (hereinafter the "ICTR"), as well as that of the International Criminal Court (hereinafter the "ICC") — it constitutes "subsidiary means for the determination of rules of law" within the meaning of Article 38 of the Statute. Even if international criminal courts do not have jurisdiction to rule on the responsibility of States, but rather on that of individuals, recourse to their jurisprudence in interpreting the concept of the crime of genocide set forth in the Convention and, in particular, the genocidal intent required by Article II thereof, is still justified for several reasons.

10. First, the Court itself has extensively referred to such jurisprudence, particularly that of the ICTY. Belgium notes that, in both its Judgment of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (hereinafter the "2007 Judgment")[12] and its Judgment of 3 February 2015 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (hereinafter the "2015 Judgment")[13], the Court relied in large part on the jurisprudence of the ICTY to support its reasoning, especially regarding the establishment of genocidal intent. In its 2007 Judgment, the Court expressly noted that not only "relevant findings of fact made by the [ICTY]"[14] but also "any evaluation by the Tribunal

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[8] See e.g. International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018, conclusion 2, paras. 4 and 5.

[9] See e.g. Organic law No. 15-003 on the creation, organisation and functioning of the Special Criminal Court, 3 June 2015.

[10] These Chambers were established on the basis of the Cambodian Law of 27 Oct. 2004 (Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)).

[11] This Chamber is the result of a law promulgated by the High Representative for Bosnia and Herzegovina on 12 Nov. 2000. It was established on the basis of a law passed by the Parliament of Bosnia and Herzegovina on 3 July 2002.

[12] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 166, para. 296, and p. 190, para. 354.

[13] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 121-122, paras. 414-416, and pp. 123-124, paras. 424-430.

[14] *Ibid.*

based on the facts as so found for instance about the existence of the required intent"[15] were "entitled to due weight"[16]. Second, Belgium observes that the definition of the crime of genocide set forth in the statutes of international criminal courts and tribunals is identical to the one in Article II of the Convention. It therefore seems appropriate for the interpretations given by the Court and by international criminal courts and tribunals to converge, so as to preserve the unity of international law and avoid any risk of fragmentation[17]. Third, Belgium notes that some of these bodies, particularly the ICTY, have interpreted the concept of the crime of genocide by relying expressly on the Convention and using the traditional means of treaty interpretation in international law enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties[18]. Fourth, Belgium observes that these same judicial bodies, in their respective analyses, have on occasion identified the existence of genocidal intent — an essential element of the crime of genocide — on the part of collective entities, before examining whether such intent could be attributed to the accused individually. In the *Kayishema and Ruzindana* case, for instance, the ICTR found that "in Kibuye Prefecture, the plan of genocide was implemented by *the public officials*"[19]. Similarly, in the *Tolimir* case, the ICTY affirmed it had no doubt that "the Bosnian Serb Forces who committed the underlying acts set out in Article 4 (2) *(a)-(c)* intended the physical destruction of the Bosnian Muslim population of Eastern BiH"[20].

11. Belgium therefore considers that the existence of a crime of genocide should be determined by the Court similarly to how it is done by international criminal tribunals. However, only the Court has jurisdiction to rule on the responsibility of a State for the commission of such a crime, basing itself on the rules of general international law relating to the international responsibility of States. Accordingly, in its 2015 Judgment, the Court affirmed that it "will . . . take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, as it did in 2007, in examining the constituent elements of genocide in the present case", further adding that "if it is established that genocide has been committed, the Court will then seek to determine the responsibility of the State, on the basis of the rules of general international law governing the responsibility of States for internationally wrongful acts"[21].

II. CONTENT OF THE INTERPRETATION

12. Article II of the Convention reads as follows:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> *(a)* Killing members of the group;
>
> *(b)* Causing serious bodily or mental harm to members of the group;

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[15] *Ibid.*

[16] *Ibid.*

[17] See e.g. E. Cannizzaro, "Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ", *European Journal of Legal Studies*, 2007, p. 54.

[18] See e.g. ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, para. 541.

[19] ICTR, *The Prosecutor* v. *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, Judgement, 21 May 1999, para. 312 (emphasis added).

[20] ICTY, *Prosecutor* v. *Tolimir* (IT-05-88/2-[T]), Trial Chamber, Judgement, 12 Dec. 2012, para. 773.

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 61, para. 129.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

13. Under Article II of the Convention, the crime of genocide involves the commission of physical acts (*actus reus*) listed in Article II *(a)* to *(e)*. In addition, as the Court has noted, "the essential characteristic of genocide, which distinguishes it from other serious crimes"[22], is the specific intent of the perpetrator of these acts, i.e. the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" (*dolus specialis* or genocidal intent). This intent "must be present in addition to the intent required for each of the individual acts involved"[23] and, together, they constitute the mental elements required for establishing the existence of a crime of genocide (*mens rea*)[24].

14. As indicated in its Declaration of intervention[25], Belgium wishes to provide the Court with its views on the construction of the concept of genocidal intent as laid down in Article II of the Convention in cases where prohibited acts are committed in the particular context of an armed conflict. More specifically, it will endeavour to ascertain whether such a context may have an effect on the identification of genocidal intent. To this end, Belgium will begin by examining in turn the impact of the existence of an armed conflict (A), the question of the belligerents' claim of pursuing a military objective (B), and the other considerations relating to armed conflict that might be invoked by a belligerent (C).

15. Belgium will show that the existence of an armed conflict, and the military considerations often invoked in such contexts, do not constitute an obstacle to the identification of genocidal intent. More specifically, it will underline the limits of justifications based on military considerations and will explain why such considerations have no effect on the identification of genocidal intent.

A. The existence of an armed conflict has no effect on the possibility of identifying a crime of genocide

16. It goes without saying that genocidal intent cannot be precluded simply because a material act prohibited under Article II of the Convention was committed during an armed conflict. This position is clear from the text of the Convention itself. Article I indeed provides that genocide "is a crime under international law", "whether committed in time of peace or *in time of war*"[26]. The ordinary meaning of this provision indicates that the commission of a crime of genocide does not depend on the presence or absence of armed conflict.

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[22] *Ibid.*, p. 62, para. 132.

[23] *Ibid.*

[24] See e.g. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 Jan. 2005, para. 491; C. Kress, "The Crime of Genocide under International Law", *International Criminal Law Review*, 2006 ("C. Kress"), pp. 484 *et seq*.; W. Schabas, *Genocide in International Law*, CUP, 2000, pp. 206 *et seq*.

[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Declaration of intervention of the Kingdom of Belgium, Intervention under Art. 63 of the Statute of the International Court of Justice, 11 Dec. 2024, para. 21.

[26] Emphasis added.

17. The above position is confirmed by both domestic and international criminal jurisprudence. With very few exceptions[27], the crimes of genocide identified and condemned by domestic or international courts were committed in times of war. The ICTR and certain domestic courts recognized the existence of a crime of genocide against the Tutsi on Rwandan territory, while noting that Rwanda was involved in an armed conflict at the time[28]. Similarly, the ICTY and the ICJ established the existence of a crime of genocide against thousands of Muslim men in Srebrenica after first observing that an armed conflict existed in Bosnia and Herzegovina[29]. Likewise, the ECCC found that a crime of genocide was committed by certain leaders of the Democratic Kampuchea against the Cham and Vietnamese minorities at a time when, according to the Chambers, the Democratic Kampuchea was engaged in an armed conflict against Vietnam[30]. In addition, certain domestic courts have found that members of the Islamic State committed a crime of genocide against the protected group consisting of the Yazidis in the Syrian Arab Republic during the armed conflict between the Islamic State and various armed actors on Syrian territory[31].

18. It is moreover worth noting that, as far as Belgium is aware, no criminal court or tribunal has ever rejected the characterization of a crime as genocide on the sole grounds that it was committed during a period of armed conflict. As Judge Cançado Trindade noted in a dissenting opinion appended to the 2015 Judgment, "[o]ne cannot characterize a situation as one of armed conflict, so as to discard genocide. The two do not exclude each other."[32]

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[27] See e.g. United States Military Tribunal, *United States of America* v. *Alstötter et al.*, 1948, 6 LRTWC 1, 3 TWC, p. 983; *Tribunal de grande instance de Kinshasa/Kalamu*, *Mputu Muteba et consorts*, RP 11.154, 11.155-11.156.

[28] With regard to the ICTR, see e.g. ICTR, *The Prosecutor* v. *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, Judgement, 21 May 1999, paras. 344, 345 and 597; ICTR, *The Prosecutor* v. *Rutanga* (ICTR-96-3-A), Appeals Chamber, Judgement, 26 May 2003, paras. 555 and 561; ICTR, *The Prosecutor* v. *Semanza* (ICTR-97-20-T), Trial Chamber, Judgement, 15 May 2003, paras. 436 and 514; regarding domestic jurisprudence, see e.g. *Cour d'assises* for the administrative district of Brussels-Capital, *Emmanuel Kasim Nkunduwimye* case, Judgment, 6 June 2024, unpublished, pp. 8, 17, 19 and 23.

[29] With regard to the ICTY, see e.g. ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, paras. 598 and 481; ICTY, *Prosecutor* v. *Popović* (IT-05-88-T), Trial Chamber, Judgement, 10 June 2010, paras. 863 and 744; ICTY, *Prosecutor* v. *Tolimir* (IT-05-88/2-[T]), Trial Chamber, Judgement, 12 Dec. 2012, paras. 791 and 686; ICTY, *Prosecutor* v. *Mladić* (IT-09-92-T), Trial Chamber, Judgement, 22 Nov. 2017, paras. 3554 and 3020; regarding the Court, see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 166, para. 297, p. 154, para. 276, and p. 176, para. 323.

[30] See e.g. ECCC (Case No. 002/19-09-2007-ECCC/SC), Trial Chamber, Judgment, 16 Nov. 2018, paras. 336, 3348 and 3519; ECCC (Case No. 002/19-09-2007-ECCC/SC), Appeals Chamber, Judgment, 23 Dec. 2022, paras. 1611 and 1638.

[31] See e.g. Higher Regional Court of Frankfurt, *Taha Al-J* case, first instance, 30 Nov. 2021, IV. 1. and IV. 3. *(a) (aa)*, available at the following address: https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903. German Federal Court of Justice, *Taha Al-J* case, appeal, 30 Nov. 2022, B. II. 1. and B. II. 2. *(a) (aa)* (2), available at the following address: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=530a10c90e91eb516b0ac5b0015d33c4&nr=132381&pos=0&anz=1.

[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, dissenting opinion of Judge Cançado Trindade, p. 253, para. 144.

B. The claim of pursuing a military objective is not sufficient to preclude the identification of genocidal intent

19. Genocidal intent is generally interpreted in national and international jurisprudence as requiring that the intent[33] or "aim"[34] of the prohibited acts must be to destroy, in whole or in part, a national, ethnical, racial or religious group (hereinafter a "protected group") as such, or that the perpetrator must "seek to" achieve such a result[35]. Genocidal intent is thus characterized by its objective of destroying, in whole or in part, a protected group as such.

20. Moreover, in accordance with both national and international jurisprudence, "[i]n the absence of a State plan expressing the intent to commit genocide"[36], genocidal intent can be inferred from a set of factual circumstances that reveal the pattern of conduct adopted by the perpetrator[37]. However, in that case, according to the jurisprudence of the Court, such intent will be established only if it constitutes "the only reasonable inference which can be drawn from th[at] pattern of conduct"[38].

21. Nevertheless, belligerents commonly invoke the pursuit of a military objective to justify committing an act prohibited by the Convention[39] and attempt thereby to preclude the existence of genocidal intent. In Belgium's view, the claim of pursuing a military objective is not sufficient to preclude the possibility of genocidal intent on the part of a belligerent. This interpretation is based in particular on international jurisprudence.

22. In several cases concerning the genocide committed in Srebrenica, the defence argued that genocidal intent could not be established on the part of the accused for the murder of the Muslims of Bosnia and Herzegovina in Srebrenica, on the grounds that the acts of which they were accused pursued a military objective. The judges rejected this argument by identifying a set of elements in the available evidence that revealed genocidal intent on the part of the accused.

23. In the *Krstić* case, the defence contended that "the facts instead prove[d] that the . . . forces [of the army of the Republika Srpska] intended to kill solely all potential fighters in order to eliminate

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[33] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 123, para. 190.

[34] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 122, para. 419; ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, para. 571.

[35] See e.g. ICTR, *The Prosecutor* v. *Akayesu* (ICTR-96-4-T), Trial Chamber, Judgement, 2 Sept. 1998, para. 498. See also C. Kress, p. 493; K. Ambos, "What does 'intent to destroy' in genocide mean?", *International Review of the Red Cross*, 2009, p. 838.

[36] See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 66, para. 145.

[37] See e.g. ICTY, *Prosecutor* v. *Tolimir* (IT-05-88/2-T), Trial Chamber, Judgement, 12 Dec. 2012, para. 745.

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 122, para. 417. See also ICTY, *Prosecutor* v. *Radovan Karadzić* (IT-95-5/18-T), Trial Chamber, Judgement, 24 Mar. 2016, para. 2605.

[39] For different types of military objectives invoked by belligerents, see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 156, para. 278; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 Jan. 2005, para. 3; ECCC (Case No. 002/19-09-2007-ECCC/SC), Judgment, 23 Dec. 2022, para. 1616.

any future military threat"[40]. The Tribunal rejected this argument at both the trial and appellate levels by referring to a series of facts that contradicted the explanation thus proposed by the defence. It observed in particular:

— that [the army of the Republika Srpska "did not differentiate between men of military status and civilians"][41];

— that "by killing the civilian prisoners, the [perpetrator] did not intend only to eliminate them as a military danger"[42];

— that "the group killed by the [perpetrator] included boys and elderly men normally considered to be outside th[e] range [of 'men of military age']"[43] and that it was therefore possible to conclude "that they did not present a serious military threat"[44];

— that the group also included people who were "severely handicapped and, for that reason, unlikely to have been combatants"[45]; and

— that although "a small number of [wounded members of the protected group] were accorded proper treatment"[46], this "does not diminish the overwhelming evidence showing [genocidal intent]"[47], in so far as such treatment was the result of a certain degree of international pressure on the perpetrator[48].

24. Similarly, in the *Popović* case, the ICTY also found "that the evidence establishe[d] that the killing of the Bosnian Muslim males was not . . . a response to any military threat the men posed"[49]. The Tribunal based itself in this regard on several facts that, in its opinion, refuted the defence's argument, namely:

— that "the men targeted were those who had already surrendered";

— that "not even a cursory attempt was made to distinguish between civilian and soldier";

— that "some children, elderly and infirm were also killed";

— that "[s]earches were conducted in the days that followed the fall of Srebrenica to ensure that no Bosnian Muslim male escaped the grasp of the . . . Main Staff and Security Branch [of the army of the Republika Srpska]"[50].

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[40] ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, para. 593.

[41] ICTY, *Prosecutor* v. *Krstić* (IT-98-33-A), Appeals Chamber, Judgement, 19 Apr. 2004, para. 26.

[42] ICTY, *Prosecutor* v. *Krstić* (IT-98-33-A), Appeals Chamber, Judgement, 19 Apr. 2004, para. 26.

[43] *Ibid.*, para. 27.

[44] *Ibid.*

[45] ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, para. 75.

[46] *Ibid.*, para. 86.

[47] *Ibid.*

[48] In this regard, see also R. Park, "Proving Genocidal Intent: International Precedent and ECCC Case 002", *Rutgers Law Review,* 2010 ("R. Park"), p. 168.

[49] ICTY, *Prosecutor* v. *Popović* (IT-05-88-T), Trial Chamber, Judgement, 10 June 2010, para. 860.

[50] *Ibid.*

25. Finally, in the *Karadžić* case, the International Residual Mechanism for Criminal Tribunals (hereinafter the "MICT") rejected the defence argument that the accused's remarks at the Bosnian Serb Assembly on 6 August 1995 related only to military considerations and therefore could not constitute compelling evidence for the purpose of establishing genocidal intent on his part. The Appeals Chamber of the MICT found that "the Trial Chamber drew support for its finding that *Karadžić* shared the intent for every Bosnian Muslim male from Srebrenica to be killed from his expressed regret about the fact that some Bosnian Muslim males had managed to pass through Bosnian Serb lines"[51].

26. In Belgium's view, the claim of pursuing a military objective would not, in any event, be sufficient to preclude the existence of genocidal intent in the circumstances described below.

(a) ***When the military objective itself consists in destroying, in whole or in part, a protected group as such***

27. Belgium contends that, in some circumstances, a belligerent's military objective may in fact be to destroy, in whole or in part, a protected group as such. In the *Fulgence Niyonteze* case, for example, the Swiss Military Court of Cassation noted that "[the] aim [of the accused] was 'to support or fulfil the war efforts', to use the terminology of the ICTR; in other words, to promote the achievement of the ruling government's objectives of killing Tutsis and moderate Hutus"[52]. In the same vein, Claus Kress, a highly qualified author on the subject, has stated that "the goal of a military campaign [may be] to exterminate civilians on a massive scale"[53].

28. In such circumstances, the distinction between the belligerent's military objective and genocidal intent is blurred, with the result that recognition of the latter most certainly cannot be precluded on account of the existence of the former.

29. This observation is echoed in the *travaux préparatoires* of the Convention, especially the comments on the Draft Convention on the Crime of Genocide prepared by the United Nations Secretary-General in pursuance of the resolution of the Economic and Social Council of 28 March 1947. In these comments, the Secretary-General states from the outset that "war is not normally directed at the destruction of the enemy"[54] and that "[t]he infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide"[55]. He goes on to note that there are "clearly cases of genocide" "when one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives[; e]xamples [include] the execution of prisoners of war, the massacre of the population of occupied territory and their gradual extermination"[56].

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[51] MICT, *Prosecutor* v. *Radovan Karadzić* (MICT-13-55-A), Appeals Chamber, Judgement, 20 Mar. 2019, para. 631.

[52] Swiss Military Court of Cassation, *Fulgence Niyonteze* case, 27 Apr. 2001, para. 9 *(e)*, available at the following address: https://ihl-databases.icrc.org/en/national-practice/fulgence-niyonteze-case-military-court-cassation-27-april-2001. *[Translation by the Registry.]*

[53] C. Kress, p. 470.

[54] United Nations Secretary-General, Draft Convention on the Crime of Genocide, 26 June 1947, UN Doc. E/447, p. 27.

[55] *Ibid.*

[56] *Ibid.*, pp. 27-28.

(b) ***When the military objective corresponds to the ultimate goal of the military campaign, and the aim of destroying, in whole or in part, a protected group as such is an interim means of achieving that broader military objective***

30. Belgium considers that a crime of genocide may exist even if the destruction, in whole or in part, of a protected group as such is an interim means of achieving a broader military objective. This position is supported by domestic and international jurisprudence and is also advocated by legal scholars.

31. In the *Taha Al-J* case, for instance, the Higher Regional Court of Frankfurt (at first instance) and the German Federal Court of Justice (on appeal) found the accused, a member of the Islamic State, guilty of committing the crime of genocide against the protected group consisting of the Yazidis, even though the genocidal objective pursued was only an interim goal in the Islamic State's broader military campaign aimed at establishing a caliphate. In particular, the Higher Regional Court of Frankfurt affirmed that "the destruction of the Yazidis themselves did not need to be the ultimate objective of the accused" and that it was of little importance that "the accused acted in line with the Islamic State ideology aimed at establishing an Islamic caliphate"[57]. The Federal Court of Justice confirmed this analysis, noting that:

> "it is not problematic that, according to the findings of the judgment, *the goal of deliberately destroying the identifiable Yazidi religious group as such* . . . constituted only an *interim objective* for the accused, who was pursuing, as part of the Islamic State ideology, *the ultimate objective of establishing an Islamic caliphate* in which 'apostates' — such as Yazidis — unlike 'People of the Book' — such as Jews and Christians — should in principle have no right to exist"[58].

32. Similarly, the ECCC found that a crime of genocide was committed by Khieu Samphân, one of the leaders of the Democratic Kampuchea, against the Cham religious minority, even though this crime formed part of a broader objective of "creat[ing] a secular society where religion took second place in relation to the revolutionary goal of rebuilding the country"[59]. The Trial Chamber thus found that "the [Communist Party of Kampuchea], in the effort to establish an atheistic and homogenous society without class divisions, targeted the Cham as an ethnic and religious distinct group throughout the [Democratic Kampuchea] period"[60].

33. Likewise, in its 2007 Judgment, the Court endorsed the ICTY's findings that the genocidal intent that led to the killing of the Muslims of Srebrenica had arisen after the army of the Republika Srpska changed its military objective "from 'reducing the enclave to the urban area' . . . to the taking-over of Srebrenica town and the enclave as a whole"[61]. Thus, the destruction of the protected group consisting of the Muslims of Bosnia and Herzegovina was part of the broader military objective of the operation carried out by the army of the Republika Srpska, which was to take control

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[57] Higher Regional Court of Frankfurt, *Taha Al-J* case, first instance, 30 Nov. 2021, IV. 1. *(b) (bb)*, available at the following address: https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903. *[Translation by the Registry of the French translation provided by Belgium.]*

[58] German Federal Court of Justice, *Taha Al-J* case, appeal, 30 Nov. 2022, B. II. 1. *(a) (aa)*, available at the following address: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=530a10c90e91eb516b0ac5b0015d33c4&nr=132381&pos=0&anz=1; emphasis added. *[Translation by the Registry of the French translation provided by Belgium.]*

[59] ECCC (Case No. 002/19-09-2007-ECCC/SC), Appeals Chamber, Judgment, 23 Dec. 2022, para. 1856.

[60] ECCC (Case No. 002/19-09-2007-ECCC/SC), Trial Chamber, Judgment, 16 Nov. 2018, para. 3227.

[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 165, para. 294.

of the entire Srebrenica enclave. That nonetheless did not prevent the Court from concluding that the destruction of this group constituted a crime of genocide.

34. Moreover, in his above-mentioned dissenting opinion, Judge Cançado Trindade cautioned against the dangers of "a regrettable deconstruction of the Genocide Convention"[62] and underlined that a belligerent may have recourse to genocide as a means of achieving its military objectives:

> "it has been pertinently warned that perpetrators of genocide will almost always allege that they were in an armed conflict, and their actions were taken 'pursuant to an ongoing military conflict'; yet, '*genocide may be a means for achieving military objectives* . . . '"[63].

35. Other relevant jurisprudence is worth mentioning as well. Regarding the situation in Darfur, Sudan, Pre-Trial Chamber I of the International Criminal Court noted that the Government of Sudan was conducting a counter-insurgency campaign at the time of the alleged facts[64], and acknowledged that the commission of a crime of genocide could be one of the core components of this broader military campaign[65].

36. Finally, it is widely acknowledged in the literature that a crime of genocide may be established even when it takes place in the context of the pursuit of a broader military objective. In this regard, Christian J. Tams, Lars Berster and Björn Schiffbauer, three particularly well-known authors on this subject, have stated the following:

> "The volitional component [of the crime of genocide] requires the (full or partial) destruction of the group to be the perpetrator's *goal* . . . However, the (partial) destruction of the group does not necessarily have to be the perpetrator's ultimate goal. This holds true, at least when the (partial) destruction of the group constitutes a *necessary* intermediate step in the causal consequence leading to the sought-after end goal from the perpetrator's perspective or, respectively, when the group's destruction appears as an intermediate effect of an action that lies on the straight line of [the perpetrator's] purpose"[66].

37. In other words, both these writings and the aforementioned judicial practice show that genocidal intent may be established even when the ultimate military objective with which that intent coincides goes beyond the immediate destruction, in whole or in part, of the protected group as such.

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[62] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, dissenting opinion of Judge Cançado Trindade, p. 253, para. 144.

[63] *Ibid.*; emphasis added. In this regard, Judge Cançado Trindade quotes R. Park, p. 170.

[64] ICC, *The Prosecutor* v. *Omar Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 Mar. 2009, para. 74.

[65] *Ibid.*, paras. 147-152. It is of little importance in this regard that the Pre-Trial Chamber ultimately dismissed the genocide charge against the accused *(ibid*., para. 201) and that its decision on this point was overturned on appeal (ICC, *The Prosecutor* v. *Omar Al Bashir* (ICC-02/05-01/09), Trial Chamber, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010). The particular position of principle adopted by the Pre-Trial Chamber at first instance was not challenged either by this Chamber further on in its decision, or in the decision on appeal.

[66] C. J. Tams, L. Berster, B. Schiffbauer, *The Genocide Convention: Article-by-Article Commentary*, 2nd ed., C. H. Beck, 2024, p. 150 (footnotes omitted). See also G. Werle, F. Jeβberger, *Principles of International Criminal Law*, 4th ed., Oxford University Press, para. 946.

(c) ***When the military objective coexists with the intent to destroy, in whole or in part, a protected group as such***

38. When a military objective accounts for only one interpretation among others of the evidence available — in particular when it coexists with a plan to destroy, in whole or in part, a protected group as such — it cannot preclude the establishment of genocidal intent.

39. For instance, in the cases relating to the Srebrenica genocide committed against the Muslims of Bosnia and Herzegovina, the defence argued, with a view to precluding any genocidal intent on the part of the accused, that he had acted with the sole aim of achieving a military objective. The judges nevertheless considered that this was not the only explanation for his conduct and that, consequently, there was nothing to preclude the establishment of genocidal intent on the part of the accused.

40. In the *Krstić* case, the defence argued before the ICTY that "the killing of [all Srebrenica Muslims of military age] was motivated *solely* by the desire to eliminate them as a potential military threat"[67]. The defence further contended, in both the trial[68] and appeal[69] phases, that the military objective pursued by the accused should be considered the only reasonable explanation for his conduct, thereby precluding any genocidal intent. However, the ICTY's Appeals Chamber responded to the defence's argument by affirming that "[t]he Trial Chamber was . . . justified in drawing the inference that, by killing the civilian prisoners, the [army of the Republika Srpska] did not intend *only* to eliminate them as a military danger". The Chamber noted as a general matter that evidence in the case file supported "the Trial Chamber's conclusion that the extermination of these men was not driven *solely* by a military rationale"[70]. The Appeals Chamber thus upheld the Trial Chamber's conclusion that "some members of the . . . Main Staff [of the army of the Republika Srpska] intended to destroy the Bosnian Muslims of Srebrenica"[71].

41. In the *Karadžić* case, the accused disputed before the MICT that genocidal intent could be inferred from the evidence against him for the murder of Muslims of Bosnia and Herzegovina in Srebrenica. In particular, he claimed before the Appeals Chamber that "the Trial Chamber erred in relying on his comments at the Bosnian Serb Assembly session on 6 August 1995 as he was referring to . . . *military tactics* [of the army of the Republika Srpska] and not the killing of civilians, which [was] evident from reading his remarks in full"[72]. The MICT Appeals Chamber rejected the accused's argument, asserting that he had "merely provide[d] *an alternative interpretation* of the evidence but [had] fail[ed] to demonstrate that the Trial Chamber's interpretation of his statement or its reliance on it in establishing his [genocidal] intent was *unreasonable*"[73].

42. In other cases, genocidal intent could not be established owing to a lack of sufficient evidence. The judicial body seised of the matter was obliged to acknowledge the existence of another

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[67] ICTY, *Prosecutor* v. *Krstić* (IT-98-33-A), Appeals Chamber, Judgement, 19 Apr. 2004, para. 26 (emphasis added); see also, ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, para. 593.

[68] ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, para. 593.

[69] ICTY, *Prosecutor* v. *Krstić* (IT-98-33-A), Appeals Chamber, Judgement, 19 Apr. 2004, para. 26.

[70] *Ibid.*; emphasis added.

[71] *Ibid.*, para. 38.

[72] MICT, *Prosecutor* v. *Radovan Karadzić* (MICT-13-55-A), Appeals Chamber, Judgement, 20 Mar. 2019, para. 628; emphasis added.

[73] *Ibid.*, para. 631; emphasis added.

explanation for the belligerent's pattern of conduct. Based on the available evidence, it could not reasonably infer the existence of genocidal intent.

43. In its 2007 Judgment, for example, the Court was unable to conclude that certain prohibited acts had been committed with genocidal intent, basing itself, in particular, on the ICTY's jurisprudence according to which "the *only reasonable conclusion* in light of the evidence in the Trial Record [was] that the primary *purpose* of the campaign was to instil in the civilian population a state of extreme fear"[74]. Similarly, in its 2015 Judgment, agreeing with the ICTY's conclusion that the "acts . . . that constitute the *actus reus* of genocide . . . were not committed with intent to destroy the [members of the protected group], *but rather with* that of forcing them to leave the regions concerned", the Court concluded that the available evidence did not support the applicant's assertion that "genocidal intent [was] the only reasonable inference [that could] be drawn"[75].

C. Other considerations relating to armed conflict that have no effect on the possible identification of genocidal intent

44. Belgium would now like to examine other considerations relating to the existence of an armed conflict which should in no way be taken into account to establish the existence of genocidal intent. Three categories of considerations are identified.

(a) *The belligerent's motives*

45. Belgium notes that domestic and international criminal courts and tribunals generally make a clear distinction between the reasons (or motives) that drive a perpetrator to commit acts prohibited by Article II of the Convention, on the one hand, and the perpetrator's intent, on the other. Motives are defined as "the reason prompting the offender to carry out the offence"[76], whereas intent is "the seeking of a wrongful result" by the offender[77]. However, according to this jurisprudence, motives, unlike intent, cannot under any circumstances be taken into account to establish the existence of a crime of genocide.

46. This well-established distinction in the jurisprudence of the ICTY[78] was reaffirmed in the *Stakić* case: "[t]he Prosecution [was] correct that the Tribunal's jurisprudence distinguishes between motive and intent[and that,] in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt"[79]. This position is also supported by the ICTR. In the *Simba*

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[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 179, para. 328; emphasis added.

[75] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 124, paras. 426-428; emphasis added. See also the separate opinion of Judge Keith, *ibid.*, p. 182, para. 13.

[76] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, dissenting opinion of Judge Mahiou, pp. 423-424, para. 70. See also C. Tournaye, "Genocidal Intent before the ICTY", *International and Comparative Law Quarterly*, 2003, pp. 451-453.

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, dissenting opinion of Judge Mahiou, pp. 423-424, para. 70.

[78] See e.g. ICTY, *Prosecutor* v. *Tadić* (IT-94-1-A), Appeals Chamber, Judgement, 15 July 1999, para. 269; ICTY, *Prosecutor* v. *Jelisić* (IT-95-10-A), Appeals Chamber, Judgement, 5 July 2001, para. 49; ICTY, *Prosecutor* v. *Krnolejac* (IT-97-25), Appeals Chamber, Judgement, 17 Sept. 2003, para. 102.

[79] ICTY, *Prosecutor* v. *Stakić* (IT-97-24-A), Appeals Chamber, Judgement, 22 Mar. 2006, para. 45.

case, the ICTR Appeals Chamber, referring to the Tribunal's prior jurisprudence[80], stated that contrary to what the appellant had suggested,

> "[t]he Trial Chamber did not find motive to be an element of the crime of genocide [but to] the contrary, it found, in accordance with established jurisprudence, that a possible personal motive for participating in the [joint criminal enterprise] did not preclude a finding that he possessed the intent to commit genocide"[81].

This view that the accused's motives are irrelevant for the purpose of establishing the existence of a crime of genocide is also supported by most of the legal literature[82]. Consequently, when a belligerent invokes military considerations, they cannot preclude genocidal intent if they in fact constitute the reasons (or motives) underlying its conduct.

47. Belgium recognizes that it is not always a simple matter to distinguish between motives and intent, especially when collective entities such as States are concerned. That said, as Belgium mentioned above[83], the conditions for establishing the commission of a crime of genocide must not vary according to whether the court or tribunal seised is ruling on the responsibility of an individual or on that of a State.

48. In addition, in its 2007 and 2015 Judgments, the Court never expressly took motives into account in assessing the commission of a crime of genocide. It is also well known that the words "as such" contained in Article II of the Convention and qualifying "intent to destroy, in whole or in part, a national, ethnical, racial or religious group" were inserted into the Convention by its drafters as a compromise between the delegations in favour of including motives as a constituent element of the crime of genocide, and those opposed to this idea[84]. However, in its 2007 Judgment, the Court gave its interpretation of these words without referring to motives. It only affirmed that these words "emphasize that intent to destroy the protected group"[85]. This interpretation is in line with the one adopted by other international judicial bodies that exclude motives when determining genocidal intent. In the *Niyitegeka* case, for example, after recalling the discussion preceding the adoption of the Convention concerning the inclusion of motives as one of the elements of the crime of genocide, the ICTR Appeals Chamber stated that "the term 'as such' clarifies the specific intent requirement [and i]t does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context"[86].

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[80] ICTR, *The Prosecutor* v. *Kayishema and Ruzindana* (ICTR-95-1-A), [Appeals] Chamber, Judgement, 1 June 2001, para. 161; ICTR, *The Prosecutor* v. *Ntakirutimana* (ICTR-96-10-A and ICTR-96-17-A), Appeals Chamber, Judgement, 13 Dec. 2004, paras. 302-304; ICTR, *The Prosecutor* v. *Niyitegeka* (ICTR-96-14-A), Appeals Chamber, Judgement, 9 July 2004, paras. 48-53.

[81] ICTR, *The Prosecutor* v. *Simba* (ICTR-01-76-A), Appeals Chamber, Judgement, 27 Nov. 2007, para. 269 (footnotes omitted).

[82] See e.g. S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Clarendon Press, 1997, p. 36; P. N. Drost, *Genocide: United Nations Legislation on International Criminal Law*, A. W. Sythoff, 1959, p. 84; E. David, *Principes de droit des conflits armés*, 2nd ed., Bruylant, 1999, para. 4.137; M. C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1995, p. 528.

[83] See *supra*, paras. 8-10.

[84] See e.g. W. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed., Oxford University Press, 2009, pp. 295-301.

[85] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 121, para. 187.

[86] ICTR, *The Prosecutor* v. *Niyitegeka* (ICTR-96-14-A), Appeals Chamber, Judgement, 9 July 2004, para. 53.

49. Certain judges of the Court have also expressly relied on this distinction between motives and intent to conclude, in the context of the 2015 Judgment, that a crime of genocide was committed. In his separate opinion appended to that Judgment, for example, Judge Bhandari recalled the jurisprudence confirming that a distinction should be made between the legal concepts of motive and intent, and that motive was irrelevant in establishing genocidal intent[87]. He re-examined the Court's findings in the case at issue regarding the attack on the city and people of Vukovar and those living in close proximity in the Vukovar municipality following the declaration of independence by Croatia[88]. The Court, referring to the relevant jurisprudence of the ICTY, had taken the view that this attack constituted punishment on the part of the attackers, "as an example to those who did not accept the Serb controlled Federal government in Belgrade"[89]. The Court had concluded, taking also into account "the fact that numerous Croats of Vukovar were evacuated . . . , that the existence of intent to physically destroy the Croatian population [wa]s not the only reasonable conclusion that c[ould] be drawn from the illegal attack on Vukovar"[90]. Judge Bhandari considered that, in so doing, the Court had conflated motive and intent, and that the desire to punish underlying the attack on Vukovar was in fact only the attackers' motive and therefore could not preclude a finding as to the existence of genocidal intent on their part. Judge Bhandari's opinion shows that the distinction between motive and intent remains critical when characterizing a crime of genocide, even in the context of acts committed by collective entities such as States. Indeed, the identification of ulterior motives must not preclude the simultaneous existence of genocidal intent.

50. Finally, in its report of 15 June 2016, the Independent International Commission of Inquiry on the Syrian Arab Republic expressly identified the motives of a collective entity, in this instance the Islamic State[91], before concluding, on the basis of the above-quoted jurisprudence of the ICTY[92], that such motives did not preclude the Islamic State's genocidal intent towards the protected group consisting of the Yazidis in Syrian territory[93]. The Commission reached this conclusion despite the fact that, in its view, the motives in question involved military considerations. It thus affirmed that "[m]otives, such as *the desire for territorial control of the Sinjar region* or the sexual gratification that resulted from the sexual enslavement of Yazidi women and girls, *do not preclude* ISIS fighters *from having the specific intent to commit genocide*"[94].

51. It is clear from all the foregoing that, even if military considerations are invoked as a belligerent's reasons or motives, such considerations cannot in themselves preclude the possibility of genocidal intent on the belligerent's part.

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[87] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, separate opinion of Judge Bhandari, pp. 441-442, para. 50.

[88] *Ibid.*

[89] ICTY, *Prosecutor* v. *Mrkšić* (IT-95-13/1-T), Trial Chamber, Judgement, 27 Sept. 2007, para. 471. This jurisprudence is reproduced by the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 125, para. 429.

[90] [*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 125, para. 429.]

[91] *Ibid.*, p. 30, fn. 58. The Commission refers to the ICTY Appeals Chamber judgment of 5 July 2001 in the *Prosecutor* v. *Jelisić* case (*supra*, fn. 86).

[92] *Ibid.*, para. 158.

[93] *Ibid.*

[94] *Ibid.*; emphasis added.

(b) ***The perception or designation of non-combatant members of a protected group as enemies***

52. Belgium maintains that a belligerent's "perception" or "designation" of non-combatant members of a protected group as enemies maintaining ties of allegiance with the adversary cannot preclude genocidal intent on the belligerent's part. This position is based primarily on domestic and international jurisprudence.

53. On the one hand, Belgium notes that, to its knowledge, not a single international court or tribunal has called into question the existence of genocidal intent on the ground that the perpetrator of the prohibited acts "perceived" non-combatant members of the protected group as internal enemies maintaining ties of allegiance with the opposing belligerent[95].

54. For example, the ECCC Co-Prosecutors submitted to the Trial Chamber that the "Vietnamese", who were victims of acts listed in Article II of the Convention that were perpetrated by the authorities of Democratic Kampuchea, were "viewed [by those authorities] as enemies allied with Vietnam"[96], which was engaged in a conflict with the Democratic Kampuchea at the time. This did not prevent the Trial Chamber from recognizing the existence of a crime of genocide committed against the Vietnamese on the territory of Democratic Kampuchea. Similarly, before concluding that a crime of genocide had been committed against the Vietnamese, the Trial Chamber noted that the Party of Democratic Kampuchea was engaging in aggressive and contemptuous discourse towards those it described as "*Yuons*", a term used specifically to refer indiscriminately to all Vietnamese enemies. According to the Chamber, this term encompassed "not only Vietnamese armed forces in the context of an escalating conflict but also Vietnamese civilians [living in Cambodia]"[97]. The Chamber also observed that such discourse was "based on a 'long-standing animosity and vitriol towards ethnic Vietnamese that . . . ' intensified with the escalation of the armed conflict with Vietnam"[98].

55. Similarly, the ICTR concluded that a crime of genocide was committed against the Tutsi in the context of an armed conflict between the Rwandan armed forces, supported by various militias, and the Rwandan Patriotic Front (hereinafter the "RPF"), even though it also repeatedly noted that Tutsi civilians were perceived by the perpetrators of the genocide as associated with the RPF and thus as enemies to be eliminated. In the *Kayishema/Ruzindana* case, for instance, the ICTR Trial Chamber observed that, shortly "[a]fter the crash of the President's plane"[99], "[t]he Hutu population began openly to use accusatory or pejorative terms, such as *Inkotanyi* (Kinyarwanda for RPF accomplice/enemy)"[100]. The Chamber also mentioned the statement made by a Hutu policeman who explained that "they killed Tutsis 'because they were the accomplices of the RPF' and that no Tutsis should be left alive"[101]. The Chamber referred to additional testimony according to which "there was

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[95] For a similar finding, see also ICC, *The Prosecutor* v. *Omar Al Bashir* (ICC-02/05-01/09), 4 Mar. 2009, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 65.

[96] ECCC (Case No. 002/19-09-2007-ECCC/SC), Trial Chamber, Judgment, 16 Nov. 2018, para. 322.

[97] *Ibid*., para. 3379.

[98] *Ibid*., para. 3388. For confirmation of these legal findings, see also ECCC (Case No. 002/19-09-2007-ECCC/SC), Appeals Chamber, Judgment, 23 Dec. 2022, paras. 1623 and 1626.

[99] ICTR, *The Prosecutor* v. *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, Judgement, 21 May 1999, para. 293.

[100] *Ibid*.

[101] *Ibid*., para. 281.

a cause-and-effect relationship correlation between the 8 April [1994] radio announcement of the purported resumption of the war [with the RPF] and the first deaths [of Tutsi civilians] in Rwanda"[102].

56. This analysis is also borne out by the observations of the truth commission established in Guatemala in 1994 to shed light on the massive human rights violations committed during the internal armed conflict ("Commission for Historical Clarification"). The Commission recognized the existence of genocide committed by agents of Guatemala against the Mayan population within the framework of "counterinsurgency operations"[103] carried out against guerrilla groups between 1981 and 1983, even though it also observed that "the Army [of Guatemala] identified [those] groups of the Mayan population as the internal enemy . . . and defined [that] concept of internal enemy that went beyond guerrilla sympathisers, combatants or militants to include civilians from specific groups"[104].

57. On the other hand, Belgium would note that the "designation" of certain non-combatants of a protected group as (internal) enemies has often been used to incite other individuals to commit acts of destruction targeting members of the group. As confirmed by international jurisprudence[105], such a designation in fact often has no other purpose than to provide a pretext for carrying out acts of destruction. It therefore cannot preclude genocidal intent on the part of those inciting these acts.

58. Accordingly, with regard to the genocide of the Vietnamese in Cambodia, the ECCC Trial Chamber identified in certain discourse of the leaders of the Party of Democratic Kampuchea a "message . . . of 'purification' of ethnic Vietnamese, which was based on a 'long-standing animosity and vitriol towards ethnic Vietnamese in Cambodia that was *mobilized* almost from the start [of the régime of the Party of Democratic Kampuchea]'"[106]. Concerning the genocide against the Tutsi in Rwanda, the ICTR stated in the *Semanza* case that "the ongoing armed conflict between the Rwandan government forces and the [Rwanda Patriotic Front], which was identified with the Tutsi ethnic minority in Rwanda, both created the situation and *provided a pretext* for the extensive killings and other abuses of Tutsi civilians"[107]. Similarly, in relation to the genocide of certain groups of the Mayan population in Guatemala, the truth commission noted that "in the majority of cases, the identification of Mayan communities with the insurgency *was intentionally exaggerated* by the State"[108].

(c) ***The conformity of the acts prohibited by the Convention with the law governing armed conflicts***

59. Belgium contends that the possibility that acts prohibited by the Convention may be in conformity with international humanitarian law (also referred to as the "law of armed conflict") is irrelevant for the purpose of identifying genocidal intent on the part of the perpetrator of such acts.

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[102] *Ibid*., para. 296.

[103] Report of the Commission for Historical Clarification: Conclusions and Recommendations, undated, para. 122.

[104] *Ibid*., para. 110.

[105] See e.g. ECCC (Case No. 002/19-09-2007-ECCC/SC), Trial Chamber, Judgment, 16 Nov. 2018, para. 3388; ICTR, *The Prosecutor* v. *Semanza* (ICTR-97-20-T), Trial Chamber, Judgement, 15 May 2003, para. 518.

[106] ECCC (Case No. 002/19-09-2007-ECCC/SC), Trial Chamber, Judgment, 16 Nov. 2018, para. 3388; emphasis added.

[107] ICTR, *The Prosecutor* v. *Semanza* (ICTR-97-20-T), Trial Chamber, Judgement, 15 May 2003, para. 518; emphasis added.

[108] Report of the Commission for Historical Clarification: Conclusions and Recommendations, undated, para. 31; emphasis added.

Belgium would recall the Court's jurisprudence in this regard. Indeed, in its 2015 Judgment, the Court affirmed:

> "the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Convention seeks to prevent and punish genocide as a crime under international law (Preamble), 'whether committed in time of peace or in time of war' (Art. I), whereas international humanitarian law governs the conduct of hostilities in an armed conflict and pursues the aim of protecting diverse categories of persons and objects."[109]

60. Similarly, in its 2007 Judgment, the Court rejected the respondent's argument that deportations or expulsions of the members of the protected group did not constitute a crime of genocide because they were justified under international humanitarian law. The Court observed "that no such justification could be accepted in the face of proof of specific intent (*dolus specialis*)"[110].

61. Belgium underlines, in accordance with this jurisprudence of the Court, that the rules relating to the prevention and punishment of the crime of genocide are, as a matter of principle, separate from those of international humanitarian law. They involve two separate legal régimes that, despite having the common objective of protecting humans in situations of violence, each pursue different aims, follow a specific logic and are developed through distinct bodies of rules. The legal régime relating to the crime of genocide is specifically intended to prevent and punish this crime by protecting certain groups, whether civilian or military, against extermination, in times of peace as in times of war. This régime is contained in the Convention and reflected in customary international law. International humanitarian law, on the other hand, is aimed at reducing the sufferings of war and protecting non-combatants, while taking into account the belligerent parties' military interests. To this end, it protects the most vulnerable categories of persons in times of war and establishes the rules governing the conduct of hostilities, in particular by distinguishing between civilians and combatants. This law is rooted in various treaties, including the four Geneva Conventions of 12 August 1949 and the three Protocols Additional thereto, and in customary international law. Each legal régime is thus distinct and autonomous: compliance with the rules of one régime in no way depends on compliance with the rules of the other[111].

62. In Belgium's view, this independence is not affected by any connections that may exist between the two bodies of rules. Indeed, on the one hand, Belgium notes that courts may rely on similar facts to establish both a genocidal pattern of conduct and a violation of international humanitarian law. The Court has, for example, already observed that one of the essential factors for proving genocidal intent is that the attacks targeting the members of a protected group "are said to have caused casualties and damage far in excess of what was justified by military necessity"[112]. This type of assessment is also crucial in international humanitarian law, in particular for determining whether an attack respects the principle of proportionality. Likewise, facts relating to the treatment

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[109] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 68, para. 153.

[110] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 181-182, para. 334.

[111] See e.g. G. Rona, N. K. Orpett, J. Cerone, "Claims of Genocide and other International Crimes in the Russia-Ukraine Conflict", *Human Righter*, 9 May 2022; N. Quénivet, "The Conflict in Ukraine and Genocide", *Journal of International Peacekeeping*, 2022, p. 10.

[112] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 121, para. 413.

of prisoners of war[113], the forced displacement of populations[114] or sexual violence[115] may be relevant in assessing compliance with the rules arising from each régime. That said, Belgium underlines that this shared characteristic concerns only questions of fact. It by no means implies a fusion of the legal régimes themselves, which remain fully independent.

63. On the other hand, Belgium observes that a single act may constitute the crime of genocide in addition to violations of international humanitarian law. In this regard, Belgium notes that in the jurisprudence, nearly every instance in which a crime of genocide has been established in times of armed conflict has involved physical acts, especially killings, which are characterized as both a crime of genocide and a war crime[116]. This dual characterization is based on the fact that these crimes comprise distinct constituent elements that justify both crimes being established. Indeed, for an act to be characterized as a crime of genocide, it must be committed with specific, genocidal intent. However, to be characterized as a war crime, a link must be established between the act in question and the armed conflict. This link — often referred to as the "nexus"[117] — is generally considered a condition *sine qua non* for the applicability of international humanitarian law[118]. Yet, a single act can be perpetrated with genocidal intent while also taking place in the context of an armed conflict. In this regard, Belgium considers that, in accordance with the jurisprudence, the demonstration of such a link cannot preclude genocidal intent.

III. CONCLUSION

64. In light of the foregoing, Belgium contends that Article II of the Convention must be interpreted as meaning that *genocidal intent may be identified if sufficient evidence is available, even if*:

(1) The prohibited act was committed during armed conflict.

(2) The perpetrator of the prohibited act claims to have been pursuing a military objective, whereas

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[113] See United Nations Secretary-General, Draft Convention on the Crime of Genocide, 26 June 1947, UN Doc. E/447, p. 28 on the subject of genocide. See also Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 Aug. 1949.

[114] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 126, para. 434 on the subject of genocide. See also Art. 49 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949.

[115] See e.g. ICTR, *The Prosecutor* v. *Rukundo* (ICTR-2001-70-T), Trial Chamber, Judgement, 27 Feb. 2009, para. 379 on the subject of genocide. See also Art. 75 of Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949.

[116] See e.g. ICTY, *Prosecutor* v. *Krstić* (IT-98-33-T), Trial Chamber, Judgement, 2 Aug. 2001, para. 680; ICTR, *The Prosecutor* v. *Rutaganda* (ICTR-96-3-A), Appeals Chamber, Judgement, 26 May 2003, para. 583; ICTR, *The Prosecutor* v. *Semanza* (ICTR-97-20-A), Appeals Chamber, Judgement, 20 May 2005, para. 369; ICTY, *Prosecutor* v. *Popović* (IT-05-88-T), Trial Chamber, Judgement, 10 June 2010, para. 2116; ICTY, *Prosecutor* v. *Tolimir* (IT-05-88/2-T), Trial Chamber, Judgement, 12 Dec. 2012, para. 1205; ICTY, *Prosecutor* v. *Mladić* (IT-09-92), Trial Chamber, Judgement, 22 Nov. 2017, para. 2116; ECCC (Case No. 002/19-09-2007-ECCC/SC), Trial Chamber, Judgment, 16 Nov. 2018, paras. 4335 and 4336; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (A/HRC/32/CRP.2), 15 June 2016, paras. 165 and 169-170; Higher Regional Court of Frankfurt, *Taha Al-J* case, first instance, 30 Nov. 2021, IV. 1. and 3., available at the following address: https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903.

[117] On this subject, see e.g. E. Pothelet, *Searching for the "nexus": A proposal to refine the scope of the applicability of international humanitarian law and war crimes*, doctoral thesis under the supervision of Professor Sassòli, Geneva, 2020; A. Cassese, "The Nexus Requirement for War Crimes", *Journal of International Criminal Justice*, 2012; N. Lubell, N. Derejko, "A Global Battlefield?", *Journal of International Criminal Justice*, 2013.

[118] See e.g. M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Elgar, 2024, pp. 219-226.

(i) this military objective itself consists in destroying, in whole or in part, a protected group as such; or

(ii) this military objective corresponds to the ultimate goal of the military campaign carried out by the belligerent in question, and the aim of destroying, in whole or in part, a protected group as such is an interim means of achieving that broader military objective; or

(iii) this military objective coexists with the intent to destroy, in whole or in part, a protected group as such.

Further, Belgium maintains that the following considerations relating to armed conflict have no effect on the identification of possible genocidal intent:

(i) when such considerations in fact constitute the perpetrator's motives for the acts in question; or

(ii) when such considerations are based on the perception or designation of non-combatant members of a protected group as enemies; or

(iii) when such considerations relate to the conformity of the acts prohibited by the Convention with the law governing armed conflicts.

Respectfully,

(Signed) Olivier BELLE,

Co-Agent of the Government, Ambassador,
Permanent Representative of the Kingdom of Belgium
to the International Organizations in The Hague.

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